

AMENDED IN ASSEMBLY MARCH 29, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1940**

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**Introduced by Assembly Member Members Hill, Ma, and Swanson**

February 22, 2012

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An act to amend Section 851.8 of the Penal Code, relating to ~~human trafficking~~ prostitution.

LEGISLATIVE COUNSEL'S DIGEST

AB 1940, as amended, Hill. ~~Human trafficking.~~ *Prostitution: human trafficking: sealing and destruction of arrest records.*

Existing law authorizes a person who has been arrested but is not convicted to petition the court for a finding that the defendant is factually innocent of the charges. If the petitioner is found factually innocent, existing law requires the court to order the records of the arrest to be sealed and destroyed, as specified.

This bill would authorize a person to petition a court to set aside a conviction for an offense relating to solicitation or prostitution, as specified, based on a finding that the person is factually innocent of the charge if the person is a victim of human trafficking and the offense is a result of the petitioner's status as a victim of that crime. In that case, the bill would require the court to order the records of the arrest to be sealed and destroyed, and to take other action appropriate under the circumstances or as justice requires.

The bill would also provide that a finding that the petitioner is factually innocent pursuant to this provision shall be admissible as evidence in a civil action brought by the petitioner, or his or her estate or representative, against an individual or entity for damages arising

*from the individual's or entity's alleged involvement in human trafficking.*

~~Existing law provides that any person who deprives or violates the personal liberty of another with the intent to effect or maintain a felony conviction for specified crimes, including prostitution and pandering, or to obtain forced labor or services, is guilty of human trafficking. A violation of this provision is punishable by imprisonment in the state prison for 3, 4, or 5 years, or, if the victim was under 18 years of age at the time of the commission of the offense, by imprisonment in the state prison for 4, 6, or 8 years.~~

~~This bill would express the intent of the Legislature to enact legislation that would delete any record of a conviction for the crime of prostitution if the defendant is a victim of human trafficking.~~

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 851.8 of the Penal Code is amended to  
2     read:  
3     851.8. (a) In any case where a person has been arrested and  
4     no accusatory pleading has been filed, the person arrested may  
5     petition the law enforcement agency having jurisdiction over the  
6     offense to destroy its records of the arrest. A copy of the petition  
7     shall be served upon the prosecuting attorney of the county or city  
8     having jurisdiction over the offense. The law enforcement agency  
9     having jurisdiction over the offense, upon a determination that the  
10    person arrested is factually innocent, shall, with the concurrence  
11    of the prosecuting attorney, seal its arrest records, and the petition  
12    for relief under this section for three years from the date of the  
13    arrest and thereafter destroy its arrest records and the petition. The  
14    law enforcement agency having jurisdiction over the offense shall  
15    notify the Department of Justice, and any law enforcement agency  
16    that arrested the petitioner or participated in the arrest of the  
17    petitioner for an offense for which the petitioner has been found  
18    factually innocent under this subdivision, of the sealing of the  
19    arrest records and the reason therefor. The Department of Justice  
20    and any law enforcement agency so notified shall forthwith seal  
21    their records of the arrest and the notice of sealing for three years  
22    from the date of the arrest, and thereafter destroy their records of

1 the arrest and the notice of sealing. The law enforcement agency  
2 having jurisdiction over the offense and the Department of Justice  
3 shall request the destruction of any records of the arrest which they  
4 have given to any local, state, or federal agency or to any other  
5 person or entity. Each agency, person, or entity within the State  
6 of California receiving the request shall destroy its records of the  
7 arrest and the request, unless otherwise provided in this section.

8 (b) If, after receipt by both the law enforcement agency and the  
9 prosecuting attorney of a petition for relief under subdivision (a),  
10 the law enforcement agency and prosecuting attorney do not  
11 respond to the petition by accepting or denying the petition within  
12 60 days after the running of the relevant statute of limitations or  
13 within 60 days after receipt of the petition in cases where the statute  
14 of limitations has previously lapsed, then the petition shall be  
15 deemed to be denied. In any case where the petition of an arrestee  
16 to the law enforcement agency to have an arrest record destroyed  
17 is denied, petition may be made to the superior court that would  
18 have had territorial jurisdiction over the matter. A copy of the  
19 petition shall be served on the law enforcement agency and the  
20 prosecuting attorney of the county or city having jurisdiction over  
21 the offense at least 10 days prior to the hearing thereon. The  
22 prosecuting attorney and the law enforcement agency through the  
23 district attorney may present evidence to the court at the hearing.  
24 Notwithstanding Section 1538.5 or 1539, any judicial determination  
25 of factual innocence made pursuant to this section may be heard  
26 and determined upon declarations, affidavits, police reports, or  
27 any other evidence submitted by the parties which is material,  
28 relevant, and reliable. ~~A~~ *Except as provided for in paragraph (2)*  
29 *of subdivision (g), a finding of factual innocence and an order for*  
30 *the sealing and destruction of records pursuant to this section shall*  
31 *not be made unless the court finds that no reasonable cause exists*  
32 *to believe that the arrestee committed the offense for which the*  
33 *arrest was made. In any court hearing to determine the factual*  
34 *innocence of a party, the initial burden of proof shall rest with the*  
35 *petitioner to show that no reasonable cause exists to believe that*  
36 *the arrestee committed the offense for which the arrest was made.*  
37 *If the court finds that this showing of no reasonable cause has been*  
38 *made by the petitioner, then the burden of proof shall shift to the*  
39 *respondent to show that a reasonable cause exists to believe that*  
40 *the petitioner committed the offense for which the arrest was made.*

1 If the court finds the arrestee to be factually innocent of the charges  
2 for which the arrest was made, then the court shall order the law  
3 enforcement agency having jurisdiction over the offense, the  
4 Department of Justice, and any law enforcement agency which  
5 arrested the petitioner or participated in the arrest of the petitioner  
6 for an offense for which the petitioner has been found factually  
7 innocent under this section to seal their records of the arrest and  
8 the court order to seal and destroy the records, for three years from  
9 the date of the arrest and thereafter to destroy their records of the  
10 arrest and the court order to seal and destroy those records. The  
11 court shall also order the law enforcement agency having  
12 jurisdiction over the offense and the Department of Justice to  
13 request the destruction of any records of the arrest which they have  
14 given to any local, state, or federal agency, person or entity. Each  
15 state or local agency, person or entity within the State of California  
16 receiving such a request shall destroy its records of the arrest and  
17 the request to destroy the records, unless otherwise provided in  
18 this section. The court shall give to the petitioner a copy of any  
19 court order concerning the destruction of the arrest records.

20 (c) In any case where a person has been arrested, and an  
21 accusatory pleading has been filed, but where no conviction has  
22 occurred, the defendant may, at any time after dismissal of the  
23 action, petition the court that dismissed the action for a finding  
24 that the defendant is factually innocent of the charges for which  
25 the arrest was made. A copy of the petition shall be served on the  
26 prosecuting attorney of the county or city in which the accusatory  
27 pleading was filed at least 10 days prior to the hearing on the  
28 petitioner's factual innocence. The prosecuting attorney may  
29 present evidence to the court at the hearing. The hearing shall be  
30 conducted as provided in subdivision (b). If the court finds the  
31 petitioner to be factually innocent of the charges for which the  
32 arrest was made, then the court shall grant the relief as provided  
33 in subdivision (b).

34 (d) In any case where a person has been arrested and an  
35 accusatory pleading has been filed, but where no conviction has  
36 occurred, the court may, with the concurrence of the prosecuting  
37 attorney, grant the relief provided in subdivision (b) at the time of  
38 the dismissal of the accusatory pleading.

39 (e) Whenever any person is acquitted of a charge and it appears  
40 to the judge presiding at the trial at which the acquittal occurred

1 that the defendant was factually innocent of the charge, the judge  
2 may grant the relief provided in subdivision (b).

3 *(f) In any case in which a person has been convicted of a charge*  
4 *under subdivision (a), (b), or (d) of Section 647 or subdivision (a)*  
5 *of Section 653.22, and the person's participation in the offense*  
6 *was a result of having been a victim of human trafficking under*  
7 *Section 236.1 or trafficking in persons under the federal Trafficking*  
8 *Victims Protection Act (22 U.S.C. Sec. 7101 et seq.), the person*  
9 *may petition the court to set aside the conviction based on a finding*  
10 *that the person is factually innocent of the charge. A copy of the*  
11 *petition shall be served on the prosecuting attorney of the county*  
12 *or city in which the accusatory pleading was filed at least 10 days*  
13 *prior to the hearing on the petitioner's factual innocence. The*  
14 *prosecuting attorney may present evidence to the court at the*  
15 *hearing. The hearing shall be conducted as provided in subdivision*  
16 *(b). If the court finds the petitioner to be factually innocent of the*  
17 *charges of which he or she was convicted, then the court shall set*  
18 *aside the conviction and grant the relief as provided in subdivision*  
19 *(b), and may take any other additional action it deems appropriate*  
20 *under the circumstances or as justice requires.*

21 *(g) For purposes of determining whether a person is factually*  
22 *innocent pursuant to subdivisions (a) to (f), inclusive, in any case*  
23 *in which a person has been arrested for, charged with, or convicted*  
24 *of a violation of subdivision (a), (b), or (d) of Section 647, or*  
25 *subdivision (d) of Section 653.22, and the person's participation*  
26 *in the offense was a result of having been a victim of human*  
27 *trafficking under Section 236.1 or trafficking in persons under the*  
28 *federal Trafficking Victims Protection Act (22 U.S.C. Sec. 7101*  
29 *et seq.), the person shall be deemed factually innocent of the*  
30 *charge.*

31 *(1) Official documentation of the petitioner's status as a victim*  
32 *of human trafficking at the time of the offense from a federal, state,*  
33 *or local government agency or documentation that another person*  
34 *has been convicted pursuant to Section 236.1 in relation to the*  
35 *petitioner's violation of subdivision (b) of Section 647, or of Section*  
36 *653.22, shall create a presumption that the petitioner's*  
37 *participation in the offense was the result of having been a victim*  
38 *of human trafficking or trafficking in persons, but shall not be*  
39 *required for relief under this section.*

1     (2) *For purposes of this subdivision, the relief provided for in*  
2 *subdivision (a), (b), or (f) may be granted notwithstanding the fact*  
3 *that there may have been reasonable cause to believe the petitioner*  
4 *committed the offense at the time of his or her conviction.*

5     ~~(f)~~

6     (h) In any case where a person who has been arrested is granted  
7 relief pursuant to subdivision (a)~~-or~~, (b), or (f), the law enforcement  
8 agency having jurisdiction over the offense or court shall issue a  
9 written declaration to the arrestee stating that it is the determination  
10 of the law enforcement agency having jurisdiction over the offense  
11 or court that the arrestee is factually innocent of the charges for  
12 which the person was arrested and that the arrestee is thereby  
13 exonerated. Thereafter, the arrest shall be deemed not to have  
14 occurred and the person may answer accordingly any question  
15 relating to its occurrence.

16     ~~(g)~~

17     (i) The Department of Justice shall furnish forms to be utilized  
18 by persons applying for the destruction of their arrest records and  
19 for the written declaration that one person was found factually  
20 innocent under subdivisions (a)~~and~~, (b), or (f).

21     ~~(h)~~

22     (j) Documentation of arrest records destroyed pursuant to  
23 subdivision (a), (b), (c), (d),~~or~~ (e), or (f), that are contained in  
24 investigative police reports shall bear the notation “Exonerated”  
25 whenever reference is made to the arrestee. The arrestee shall be  
26 notified in writing by the law enforcement agency having  
27 jurisdiction over the offense of the sealing and destruction of the  
28 arrest records pursuant to this section.

29     ~~(i)~~

30     (k) (1) Any finding that an arrestee is factually innocent  
31 pursuant to subdivision (a), (b), (c), (d),~~or~~ (e), or (f) shall not be  
32 admissible as evidence in any action.

33     (2) Notwithstanding paragraph (1), a finding that ~~an arrestee a~~  
34 *petitioner* is factually innocent pursuant to subdivisions (a) to ~~(e)~~  
35 *(f)*, inclusive, shall be admissible as evidence at a hearing before  
36 the California Victim Compensation and Government Claims  
37 Board.

38     (3) *Notwithstanding paragraph (1), a finding that a petitioner*  
39 *is factually innocent based on the fact that the petitioner’s*  
40 *participation in the offense was a result of having been a victim*

1 *of human trafficking shall be admissible as evidence in a civil*  
2 *action brought by the petitioner, or his or her estate or*  
3 *representative, against an individual or entity for damages arising*  
4 *from the individual's or entity's alleged involvement in human*  
5 *trafficking.*

6 ~~(j)~~

7 *(l) Destruction of records of arrest pursuant to subdivision (a),*  
8 *(b), (c), (d), ~~or~~ (e), or (f) shall be accomplished by permanent*  
9 *obliteration of all entries or notations upon the records pertaining*  
10 *to the arrest, and the record shall be prepared again so that it*  
11 *appears that the arrest never occurred. However, where (1) the*  
12 *only entries on the record pertain to the arrest and (2) the record*  
13 *can be destroyed without necessarily affecting the destruction of*  
14 *other records, then the document constituting the record shall be*  
15 *physically destroyed.*

16 ~~(k)~~

17 *(m) No records shall be destroyed pursuant to subdivision (a),*  
18 *(b), (c), (d), ~~or~~ (e), or (f) if the arrestee or a codefendant has filed*  
19 *a civil action against the peace officers or law enforcement*  
20 *jurisdiction which made the arrest or instituted the prosecution*  
21 *and if the agency which is the custodian of the records has received*  
22 *a certified copy of the complaint in the civil action, until the civil*  
23 *action has been resolved. Any records sealed pursuant to this*  
24 *section by the court in the civil actions, upon a showing of good*  
25 *cause, may be opened and submitted into evidence. The records*  
26 *shall be confidential and shall be available for inspection only by*  
27 *the court, jury, parties, counsel for the parties, and any other person*  
28 *authorized by the court. Immediately following the final resolution*  
29 *of the civil action, records subject to subdivision (a), (b), (c), (d),*  
30 *~~or~~ (e), or (f) shall be sealed and destroyed pursuant to subdivision*  
31 *(a), (b), (c), (d), ~~or~~ (e), or (f).*

32 ~~(t)~~

33 *(n) For arrests occurring on or after January 1, 1981, and for*  
34 *accusatory pleadings filed on or after January 1, 1981, petitions*  
35 *for relief under this section may be filed up to two years from the*  
36 *date of the arrest or filing of the accusatory pleading, whichever*  
37 *is later. Until January 1, 1983, petitioners can file for relief under*  
38 *this section for arrests which occurred or accusatory pleadings*  
39 *which were filed up to five years prior to the effective date of the*  
40 *statute. Any*

1 (1) Any time restrictions on filing for relief under this section  
2 may be waived upon a showing of good cause by the petitioner  
3 and in the absence of prejudice.

4 (2) *For petitions brought pursuant to this section by persons*  
5 *determined to have been victims of human trafficking under Section*  
6 *236.1 or trafficking in persons under the federal Trafficking Victims*  
7 *Protection Act (22 U.S.C. Sec. 7101 et seq.), the waiver of time*  
8 *restriction upon showing of good cause shall be interpreted broadly*  
9 *in favor of granting the petitioner relief. When evaluating whether*  
10 *good cause exists, the court shall take into consideration relevant*  
11 *factors, including, but not limited to, when the petitioner ceased*  
12 *to be a victim of human trafficking or trafficking in persons,*  
13 *reasonable concern for the safety of the petitioner and the*  
14 *petitioner's family, the age and capacity of the petitioner, the*  
15 *petitioner's ability to obtain legal services, and other obstacles*  
16 *that may have prevented the petitioner from filing the petition*  
17 *within the time period.*

18 ~~(m)~~

19 (o) Any relief which is available to a petitioner under this section  
20 for an arrest shall also be available for an arrest which has been  
21 deemed to be or described as a detention under Section 849.5 or  
22 851.6.

23 ~~(n)~~

24 (p) This section shall not apply to any offense which is classified  
25 as an infraction.

26 ~~(o)~~

27 (q) (1) This section shall be repealed on the effective date of a  
28 final judgment based on a claim under the California or United  
29 States Constitution holding that evidence that is relevant, reliable,  
30 and material may not be considered for purposes of a judicial  
31 determination of factual innocence under this section. For purposes  
32 of this subdivision, a judgment by the appellate division of a  
33 superior court is a final judgment if it is published and if it is not  
34 reviewed on appeal by a court of appeal. A judgment of a court of  
35 appeal is a final judgment if it is published and if it is not reviewed  
36 by the California Supreme Court.

37 (2) Any decision referred to in this subdivision shall be stayed  
38 pending appeal.

39 (3) If not otherwise appealed by a party to the action, any  
40 decision referred to in this subdivision which is a judgment by the



1 appellate division of the superior court shall be appealed by the  
2 Attorney General.

3 ~~(p)~~

4 (r) A judgment of the court under subdivision (b), (c), (d), ~~or~~  
5 (e), *or* (f), is subject to the following appeal path:

6 (1) In a felony case, appeal is to the court of appeal.

7 (2) In a misdemeanor case, or in a case in which no accusatory  
8 pleading was filed, appeal is to the appellate division of the superior  
9 court.

10 ~~SECTION 1. It is the intent of the Legislature to enact~~  
11 ~~legislation that would delete any record of a conviction for the~~  
12 ~~crime of prostitution if the defendant is a victim of human~~  
13 ~~trafficking.~~